

1 REPORTER'S RECORD

2 VOLUME 4 OF 21 VOLUME(S)

3 TRIAL COURT CAUSE NO. 13-276698R  
4 COURT OF APPEALS CASE NO. 02-14-00412-CR  
5 DEBRA SPISAK  
Clerk

6 THE STATE OF TEXAS ) IN THE 372ND JUDICIAL

7 VS. ) DISTRICT COURT

8 THOMAS OLIVAS ) TARRANT COUNTY, TEXAS

13 \*\*\*\*\*

14 DEFENDANT'S MOTION FOR CONTINUANCE

15 \*\*\*\*\*

16 On the 8th day of September, 2014, the following  
17 proceedings came on to be heard in the above-entitled  
18 and numbered cause before the Honorable Scott Wisch,  
19 Presiding Judge, held in Fort Worth, Tarrant County,  
20 Texas;

21 Proceedings reported by computerized machine  
22 shorthand with assisted realtime transcription.

23 KAREN B. MARTINEZ, CERTIFIED SHORTHAND REPORTER  
24 Official Court Reporter  
25 372nd Judicial District Court  
Tarrant County, Texas

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## 1 CHRONOLOGICAL INDEX

## 2 Volume 4 of 21

## 3 DEFENDANT'S MOTION FOR CONTINUANCE

4	September 8, 2014	Page	Vol.
5	The Court Calls Case for Hearing.....	4	4
6	State's Factual Recitation by Mr. Rousseau.....	4	4
7	Defendant's Response by Mr. Moore.....	14	4
8	Defendant's Response by Ms. Keene.....	20	4
9	Court's Ruling.....	26	4
10	Hearing Concluded.....	30	4
11	Court Reporter's Certificate.....	31	4

12

13

14

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## 1 P R O C E E D I N G S

2 Monday, September 8, 2014 12:40 p.m.

3 (OPEN COURT, DEFENDANT PRESENT)

4 THE COURT: This is Cause Number 1376698R,  
5 as in Romeo, The State of Texas versus Thomas Olivas. A  
6 capital murder case, waived the death penalty on the  
7 record, scheduled for trial, voir dire to begin in the  
8 morning, special set, after adjusting to the schedule of  
9 the parties.10 And I'm going to want a short factual  
11 recitation, Mr. Rousseau, about the information you  
12 obtained last week, what you did with it.13 And then, Mr. Moore, I'll allow you just to  
14 respond, not to the issues concerning the continuance,  
15 but just why -- what brings us here to have the Defense  
16 feeling obligated to file a motion for continuance.

17 MR. ROUSSEAU: Thank you, Your Honor.

18 There is a company called Securus,  
19 S-E-C-U-R-U-S.

20 THE COURT: Pause.

21 (Pause in proceedings)

22 THE COURT: Back on the record.

23 Secure, what -- a company called?

24 MR. ROUSSEAU: It's a -- the company is  
25 called Securus, S-E-C-U-R-U-S. It's a third-party -- my

1 understanding, it's a third-party contractor who records  
2 and maintains phone calls made by inmates within the  
3 Tarrant County Jail.

4 The calls are available to our office upon  
5 request and they are available to the Defense via a  
6 subpoena. If we have made a request to obtain those  
7 phone calls and then once they come into our possession,  
8 it's our office policy to provide them to the Defense.  
9 This case is -- predates the Michael Morton Act so it  
10 is -- we're not required by law, but we've always had  
11 the open-file policy, so our policy says we give them up  
12 if we have them and that's what -- that's what has  
13 occurred in this case.

14 THE COURT: All right. So if you will, what  
15 records did you request, when did you request them, when  
16 did you get them, what did you do with them?

17 MR. ROUSSEAU: Okay. Here we go. I  
18 obtained four weeks' worth of phone calls dating from  
19 mid June to mid July. I believe the exact dates are  
20 June -- June 15th to July 15th, but I would have to  
21 check that. I obtained those -- I requested those and I  
22 received those last week, specifically on Friday,  
23 without knowing the number of the calls or the total  
24 duration of the calls.

25 THE COURT: Just so I'm clear, Friday,

1 September 5th.

2 MR. ROUSSEAU: I'll trust your calendar,  
3 Judge. It was three days ago.

4 THE COURT: If this is the 8th, three days  
5 ago.

6 MR. ROUSSEAU: Yes, sir.

7 THE COURT: All right.

8 MR. ROUSSEAU: When I got them -- when I got  
9 the -- a disc was delivered to me and I was told that  
10 there were 28 hours' worth of phone calls on that disc.  
11 I immediately made a copy of the disc and I notified  
12 Mr. Moore by call and by -- I called him and I also sent  
13 him an e-mail telling him that this was available.

14 THE COURT: Can you hold that thought?

15 MR. ROUSSEAU: Yes.

16 THE COURT: Do you know -- were the calls  
17 requested, how broad or narrow was the request, calls  
18 between the Defendant and any particular person or any  
19 person? Do you know what was requested?

20 MR. ROUSSEAU: All calls.

21 THE COURT: All calls made collect by the  
22 Defendant from the Tarrant County Jail to anybody.

23 MR. ROUSSEAU: I didn't say made collect,  
24 but I think that's the only way they can make a call.

25 THE COURT: I think that's correct. Any

1 call that he made where he has to go through the system  
2 that identifies the caller to any third party that was  
3 not in jail.

4 MR. ROUSSEAU: Yes, Your Honor.

5 THE COURT: Is there any restriction on  
6 that, if there were like calls, hypothetically, to like  
7 attorneys or anything? Do you know if the jail records  
8 those calls, too, or not?

9 MR. ROUSSEAU: I think, Your Honor, that  
10 those are screened out, but I'm not the authority on  
11 that. I could not tell you.

12 THE COURT: And to be fair, you've indicated  
13 the 28, plus or minus, hours of calls purported on this  
14 disc, you have not listened to any of them yet?

15 MR. ROUSSEAU: No, sir -- well, with the  
16 very tiny exception, which I will make clear in a  
17 moment.

18 THE COURT: That will be fine. All right.  
19 Continue.

20 MR. ROUSSEAU: I went to Mr. Moore's office.  
21 I believe I got there -- and, Tim, you can correct me.

22 I believe I got there about 3:00 o'clock  
23 in -- on Friday. I know I left my office roughly 2:45.

24 THE COURT: Sometime in the midafternoon of  
25 last Friday.

1 MR. ROUSSEAU: Yes, sir.

2 THE COURT: All right. Carry on.

3 MR. ROUSSEAU: And I delivered -- I was --  
4 he was not expecting me. I just showed up and I  
5 delivered the disc to him. He was in his office. I was  
6 escorted back to his office. I gave him the disc. I  
7 informed Mr. Moore that I had not opened the disc. When  
8 I say "open," I mean put it in to a computer to see what  
9 is on it.

10 THE COURT: Electronically opened.

11 MR. ROUSSEAU: Yes. I had not opened the  
12 disc. I agreed to not open the disc and I agreed to not  
13 attempt to use the content of the disc in any way. The  
14 reason I was going to all this trouble, for lack of a  
15 better word, is because I realized I had 28 hours and  
16 I -- of calls on this disc. I didn't want to delay this  
17 trial when I saw how much I had. I had no intention of  
18 opening that can of worms.

19 So when I handed the disc to Mr. Moore, we  
20 had the conversation that I just told you about.

21 Mr. Moore put the disc into his computer and he had  
22 some -- with some assistance from --

23 THE COURT: A staff member?

24 MR. ROUSSEAU: Yes.

25 THE COURT: Okay.

1 MR. ROUSSEAU: Someone in his office.

2 I don't know Rich's last name.

3 MR. MOORE: Rich McCracken.

4 MR. ROUSSEAU: Rich McCracken. I apologize  
5 to Mr. McCracken.

6 He opened the -- he was able to get the disc  
7 to play and I had to call my partner, Tamla Ray, to kind  
8 of coach us through how to make the contents available  
9 to us. The disc -- leaning -- watching from behind Mr.  
10 Moore's desk, I was able to see that the disc appears to  
11 contain a series of calls to two different phone  
12 numbers, both in 915 area code. Mr. Moore -- I can't  
13 remember if it was Mr. Moore or McCracken -- chose one  
14 call for -- randomly chose one call from each of those  
15 two phone numbers and opened them. They both appeared  
16 to be calls to -- from Mr. Olivas to his father.

17                   We listened to a few seconds of each of the  
18 two calls to verify that they were, in fact -- that  
19 that's what we were hearing. And I left Mr. Moore's  
20 office at about 3:30 or so, and I've made no attempt to  
21 review the disc since that time. In fact, it's -- I  
22 went home for the weekend and worked at home. The disc  
23 stayed in my office. I did not return to the office  
24 that day.

25 So I think that's a fair recitation of where

1 we are.

2 THE COURT: So you requested during that  
3 time period calls made out of the jail from the  
4 Defendant with no limitation as to who, you've listened  
5 to little partials of two of what apparently -- if it is  
6 28 hours or assumably numerous calls, regardless of  
7 duration, even if there's just 28. And you have -- can  
8 make a copy of the disc, have it marked as Court's  
9 Pretrial Exhibit 1, deliver to the court reporter, after  
10 having both sides assured that's what I'm being given is  
11 what y'all have.

12 MR. ROUSSEAU: Okay.

13 THE COURT: And you do not intend to use any  
14 of the contents directly or indirectly.

15 MR. ROUSSEAU: No, sir. And, Your Honor,  
16 just for clarification. I think we might already have a  
17 Pretrial Exhibit 1.

18 THE COURT: Or whatever the -- is it Court's  
19 Pretrial 1?

20 MR. ROUSSEAU: It's been too long, Your  
21 Honor. I don't remember.

22 THE COURT: All right. Well --

23 MR. ROUSSEAU: I'll mark it any way the  
24 Court sees fit.

25 THE COURT: Well, in all fairness, I know we

1 had the pretrial hearings. As long as we make a record  
2 the next time we meet, regardless of when that may be...

3 MR. ROUSSEAU: Yes, sir.

4 THE COURT: In hours or days, that this is  
5 the disc that was discussed during the hearing on the  
6 Defendant's motion for continuance, file-marked on  
7 September 8th of 2014 at 9:03 a.m. And --

8 MR. ROUSSEAU: Yeah.

9 THE COURT: -- as long as we're in  
10 agreement, it doesn't really matter what the label is,  
11 as long as it's identified.

12 So other than what appears to be a call with  
13 the father, you have no idea of who, if anyone, he  
14 talked to besides the father, from your perspective,  
15 from the State -- what the State knows of the contents  
16 of the disc?

17 MR. ROUSSEAU: No, sir.

18 THE COURT: Regardless of what Defense may  
19 know based upon privileged conversations with their  
20 client, which I'm assuming upon being given that disc  
21 they probably grilled him -- I'm confident they grilled  
22 him about anyone he may have talked to and what may have  
23 been said, helpful or harmful.

24 MR. ROUSSEAU: All right.

25 THE COURT: You only know that there's

1 a call -- two calls to the father.

2 MR. ROUSSEAU: There were a lot of calls to  
3 two different numbers. They both appear to be numbers  
4 belonging to the father.

5 THE COURT: All right. All right. So you  
6 don't know who's on the line, just based on knowing  
7 there's calls to a number, you don't know who the  
8 parties are, but that's the -- you're identifying that  
9 by phone number.

10 MR. ROUSSEAU: Two calls that we sampled  
11 are -- those two same numbers appear over and over and  
12 over. The two that we sampled were from -- to his  
13 father.

14 THE COURT: The father is who appeared on  
15 the line. That --

16 MR. ROUSSEAU: We are assuming it's his  
17 father. I believe it was his father.

18 THE COURT: As someone who had one, you --  
19 if the tenure of the conversation, the short part you  
20 heard is consistent with someone talking to their dad.

21 MR. ROUSSEAU: What it sounded like to me,  
22 Your Honor.

23 THE COURT: All right. All right.

24 Anything else?

25 MR. ROUSSEAU: Factually, that's all I have,

1 Your Honor.

2 THE COURT: All right.

3 Mr. Moore.

4 MR. MOORE: Well, Judge --

5 THE COURT: First of all, do you have  
6 anything that Kevin has dictated about the approximate  
7 time about the sampling process with the assistance  
8 of --

9 MR. ROUSSEAU: Your Honor --

10 THE COURT: Oh, I'm sorry.

11 MR. ROUSSEAU: I apologize. Okay. Ms. Ray  
12 is here and she told me she had the disc the day before,  
13 on Thursday. And I didn't get it until Friday, so --

14 THE COURT: Okay.

15 MR. ROUSSEAU: -- with that clarification.

16 THE COURT: All right. Tamla, have you  
17 listened to any of the disc?

18 MS. RAY: No, I haven't listened to it at  
19 all.

20 THE COURT: Okay. All right. All right.

21 With that addition, is there anything, as a  
22 general summary, about what he has said about when you  
23 got the disc, about what happened in your office?

24 MR. MOORE: No, he's absolutely correct.

25 THE COURT: All right. Then you may pick it

1 up from there.

2 MR. MOORE: Well, as my motion, as I've  
3 stated in my motion, Judge, that disc that Mr. Rousseau  
4 delivered on Friday, September 5th, to my office  
5 contains 119 recordings, which is approximately 29.5  
6 hours of telephone conversation between my client and  
7 he's -- Mr. Rousseau is correct, a telephone number that  
8 we sampled and two calls sounded like his dad.

9 THE COURT: All right. Hold that thought.  
10 Have you ever talked to his dad in person?

11 MR. MOORE: Yes, I have.

12 THE COURT: So it -- you'd have the ability  
13 to recognize a voice that Kevin may not have? Are  
14 you -- is it your belief it's his dad?

15 MR. MOORE: I wouldn't swear under oath it  
16 was his dad, but I mean --

17 THE COURT: It was consistent with -- what  
18 you heard, you believe that's --

19 MR. MOORE: Yes.

20 THE COURT: -- correct?

21 Go ahead.

22 MR. MOORE: I immediately contacted  
23 co-counsel, Ms. Keene. We discussed it. We met at the  
24 jail Saturday morning and went and saw our client,  
25 Mr. Olivas, and explained the situation to him. And

1 that's why we collectively decided to file a motion for  
2 continuance. We felt like that we needed to have an  
3 opportunity to review these tapes and listen to them for  
4 any possible Brady, for any possible exculpatory  
5 evidence, or evidence that could lead to Brady or any  
6 kind of exculpatory material.

7                   And that's why I prepared the motion and  
8 filed it this morning. And we feel that -- we -- to  
9 effectively represent our client under the United States  
10 and state constitution that we should be given an  
11 opportunity at this late minute before trial -- and  
12 we're not asking for a long period of time, but at least  
13 enough time to review these tapes that they provided us,  
14 like I said, to adequately and effectively represent our  
15 client.

16                   We've also asked in our motion that the  
17 State provide us with all of the phone records -- phone  
18 conversations that were recorded between Mr. Olivas and  
19 whoever he may have called from the Tarrant County Jail  
20 while he's been incarcerated.

21                   We've also learned that Mr. Olivas had many  
22 conversations with his mother who speaks Spanish and  
23 those conversations were in Spanish between Mr. Olivas  
24 and his mother, and we're also asking the Court not only  
25 to grant us a continuance to review those, but to

1 provide an interpreter to listen to those conversations  
2 to aid us in the representation of our client.

3 THE COURT: I'll ask the two Defense  
4 attorneys, have you ever encountered a situation  
5 representing clients other than Mr. Olivas where the  
6 recorded conversations, the sheriff's department, have  
7 been used in evidence? Are you aware of the existence  
8 of the system by which inmate calls are recorded prior  
9 to the disclosure that was made by Mr. Rousseau on  
10 Friday afternoon?

11 MS. KEENE: Yes, sir.

12 THE COURT: Have you had occasions to be  
13 aware that --

14 MR. MOORE: Am I aware that --

15 THE COURT: -- clients --

16 MR. MOORE: -- that they are now --

17 THE COURT: -- that calls are recorded?

18 MR. MOORE: I'm aware that they --

19 THE COURT: Prior to Friday were you aware  
20 of it?

21 MR. MOORE: I think everybody in this  
22 courthouse is aware of it.

23 THE COURT: That is my belief, especially  
24 those of the character and quality of attorneys that  
25 Mr. Olivas has standing beside him right now. Have

1 y'all made any efforts, because of potential Brady or  
2 investigatory reason or anything, to subpoena or try to  
3 obtain those phone records prior to the disc being  
4 dumped in your lap Friday afternoon?

5 MR. MOORE: Well, he came to my office and  
6 left around 3:30. I --

7 THE COURT: No, I'm talking about before.

8 MR. MOORE: Oh. Oh.

9 THE COURT: Before Kevin says "we got this  
10 deal and we're not going to use it" or if "we got this  
11 deal and we are to going to use it," had y'all made any  
12 efforts for -- and I'm not questioning whether you would  
13 or would not in the tactical and Pandora's box reasons  
14 that someone may or may not do that. I'm not trying to  
15 be a barbershop quarterback. But I'm just saying prior  
16 to Kevin giving you some jail records, had y'all made  
17 any efforts to obtain records of your client's calls  
18 during the pendency of his incarceration in the --

19 MR. MOORE: We had --

20 THE COURT: -- Tarrant County Jail and your  
21 representation of him during the same?

22 MR. MOORE: We have not issued a subpoena to  
23 Securus to obtain any records. But I'll add this,  
24 Judge, you know, we have to subpoena them, all the State  
25 has to do is pick up the phone and request those

1 records. And they did that. And they are in possession  
2 of them. And they turned over a copy of some of them to  
3 us, or 30 days' worth of them to us.

4 And it just seems to me out of fundamental  
5 fairness that if the State has some evidence, regardless  
6 of whether they say they listened to them or not, that  
7 we ought to be provided an opportunity to at least  
8 review them.

9 THE COURT: And you have two issues in your  
10 motion. One is to review what they've obtained and one  
11 for them to use their shortcut method to get any  
12 conversations that your client has had.

13 MR. MOORE: Okay. Well, I'll tell you what,  
14 I'll --

15 THE COURT: I'm -- I'm --

16 MR. MOORE: -- waive that.

17 THE COURT: I'm just pointing that that's  
18 part of the motion. In all fairness, it's probably  
19 something different than should be on the four corners  
20 of a continuance motion. But having said that, I guess  
21 I just want to be aware -- and sadly, I have lawyers  
22 come in every day, and I know y'all are not -- but for  
23 purposes of a deaf and blind justice record that a court  
24 reporter writes down, have you, for reasons of strategy  
25 or investigative prowess or things you had information

1 from some source that there may have been a recorded  
2 conversation where hypothetically your client tells you  
3 that the person who really committed this crime he  
4 called on the phone and apologized to them for him being  
5 in jail and you'd had a reason to seek out and obtain  
6 those records, you could have done so and without having  
7 to rely on the cooperation of the State to make the  
8 call, you would have issued the subpoena or talked to  
9 someone at the sheriff's office and are confident you  
10 could have obtained those records, had you sought to  
11 obtain them, you could have gotten them.

12 MR. MOORE: Well, I think that's fairly  
13 obvious, Judge.

14 THE COURT: Yeah, I think it is, too, but --  
15 to us in this room, absolutely, but for the black and  
16 white record of the court reporter, I'm not so sure.  
17 And it's sad to say there are people who have stood in  
18 the shoes you are, thankfully not on a case of this  
19 magnitude, who had no clue they recorded jail  
20 conversations, and wouldn't know to ask or wouldn't know  
21 to look and it wouldn't be they were evil. They would  
22 just be inexperienced or maybe not as sophisticated in a  
23 trial of serious criminal matters.

24 MS. KEENE: And, Judge, I don't think the --

25 THE COURT: Hold on a second. Are you

1 through for now, ready to pass?

2 MR. MOORE: I'll pass to Ms. Keene.

3 THE COURT: All right. Ms. Keene.

4 MS. KEENE: I don't believe the record is  
5 complete at this point either. There was no reason for  
6 us to subpoena those records. And the Court talked  
7 about the different reasons and -- that you would not  
8 want to subpoena them, certainly from the Defense side.  
9 And we were not privy to any conversation with any  
10 person, whether it be through hearsay or not, that  
11 Thomas had had a conversation with an aunt or anyone  
12 else that apparently had some relevance to this case.  
13 We were never even privy to that.

14 I know the prosecutor -- I don't believe  
15 that was part of the factual recitation. I don't  
16 remember it or not.

17 THE COURT: And hold that thought.

18 Mr. Rousseau, who is the aunt? Just so this  
19 record is clear.

20 MR. ROUSSEAU: Okay. I think what Ms. Keene  
21 is talking about is something we -- a conversation we  
22 had off the record earlier.

23 THE COURT: Yeah.

24 MR. ROUSSEAU: The reason that --

25 THE COURT: The word "aunt" didn't appear.

1 There was just a lead that you wanted to explore. So  
2 why don't you flesh that out.

3 MR. ROUSSEAU: Yes, Judge. The reason that  
4 this -- I was interested in the record in the first  
5 place is that in talking to a witness in -- sometime  
6 over the summer, this witness had told me that -- that  
7 she believed that -- she had heard, so we're talking  
8 about second- or thirdhand information, she had heard  
9 that the Defendant had called a relative, specifically  
10 his aunt, and that in an attempt to encourage her to  
11 come to the trial and be here in showing her support for  
12 him had indicated that there were some DNA that had been  
13 done that either exonerated him or pointed the --  
14 pointed a finger at someone else, something to that  
15 effect. This person that I talked to really did not  
16 have much information.

17 And it was for that reason that I was trying  
18 to get this -- get this information. That -- and when  
19 I -- when we opened the disc, I saw that the only two  
20 phone calls were to, as far as we know, to Mr. Olivas,  
21 Sr., Mr. -- the Defendant's father. I think that's what  
22 Ms. Keene is talking about.

23 It's my understanding, Your Honor, that the  
24 information I got in the first place that this phone  
25 call existed was bad information, that it does not

1 exist. I don't believe it's out there. That's the only  
2 thing I was looking for in the first place and I have no  
3 intention of reviewing records any farther.

4 MS. KEENE: Okay. But let's say that that  
5 witness, for whatever is, this is just me, why this is  
6 so scary to have 30 hours that no one has reviewed, but  
7 yet an appellate lawyer will. Let's say, for instance,  
8 that witness takes the stand and says whatever they say,  
9 be it we know that based on they've already told us  
10 about talking to an aunt, that they're inaccurate in  
11 their recollection of certain things. I would certainly  
12 be able to get to cross-examine her, "But you also told  
13 the prosecutors that Thomas had a conversation with your  
14 mother," or "with your aunt," "and we know that not to  
15 be true because here are the records," or whatever that  
16 is. It is a Pandora's box to get all of them I  
17 understand, but don't have all of them. We got 30 hours  
18 that we're all just staring at and going, Is there  
19 Brady? Is there Brady? Could this be used? Could this  
20 be used?

21 When the reality is, 30 hours, one week,  
22 Judge. If it's not there, it's not there. But right  
23 now we can't say. We can just say there was a reason he  
24 wanted it. Okay? So there was a big enough reason for  
25 the Government, the State of Texas, to request it and

1 get it. And now that we have it, we all have to just  
2 stare at it and say, well, whether it hurts us or helps  
3 us, we can't look at any more.

4 Defense doesn't have time. We don't speak  
5 Spanish, so we can't even if we had time to listen to  
6 it. We've got to have help. And the Government, you  
7 know, can't use it, but we can't use it, either, in case  
8 that witness testifies. And, actually, this tape could  
9 be used to rebut that witness's testimony or however --

10 THE COURT: Well --

11 MS. KEENE: -- it can come up.

12 THE COURT: -- I will just say this. If the  
13 issue is you can't use it and they won't use it, it  
14 means it can't be used, it won't be used, not for  
15 impeachment, not for rebuttal, not for case-in-chief.  
16 If this were traditional discovery and the day of trial  
17 someone says, Well, I found something interesting, well,  
18 that's a little too bad, should have found it sooner.

19 But if we're realistically talking about  
20 pretty much two years, the logic of your argument,  
21 Joetta, if true, would apply to every phone call that's  
22 ever been made by your client for two years, of what  
23 could be there, what might be there, what could be  
24 useful, what could be harmful. And if that logic  
25 totally trumped due process and was a due process issue,

1 was of a constitutional dimension, then that would be a  
2 reason that any and everybody for either side should be  
3 wanting to go scan every single personal phone call made  
4 out of the jail because of the possibility there might  
5 be something helpful or harmful in order to advance  
6 their position in the trial, depending on where they sat  
7 in the courtroom.

8 MS. KEENE: I think we have specific  
9 instances here, though, and that we're not talking about  
10 all of them. I know that's in the motion, but forget  
11 that part. Just --

12 THE COURT: Well, but --

13 MS. KEENE: -- we're talking about  
14 30 hours --

15 THE COURT: -- but the logic would apply --  
16 but the logic would still apply if there's something  
17 there. If you're talking about what's potential Brady  
18 or helpful, it really wouldn't matter whether the State  
19 found it first or whether the State thought they had a  
20 lead that they don't and that the phone numbers don't  
21 corroborate to some third-party aunt or other person.

22 MS. KEENE: And, Judge, I was just thinking  
23 about outside the box of the things that can come up  
24 because we don't know what's on it.

25 THE COURT: And that's why y'all are such

1 good lawyers.

2 MS. KEENE: What --

3 THE COURT: People think outside the box and  
4 they don't get sucker punched. But I guess, here's my  
5 position, this is what my gut is telling me. And with  
6 due respect to Mr. Moore's offer to tell the client he  
7 cannot make any more calls until this case is -- the  
8 trial is over with, personal calls that happen to be  
9 monitored as a matter of security or invasion of privacy  
10 or any other good or bad spin you would want to put on  
11 it but legal as long as there's a disclose that they're  
12 monitored, can go on at infinitum. And the same logic  
13 would apply to two years of past calls, not just  
14 30 days. It could apply to three weeks of continued  
15 calls, not just the past six weeks. And there's always  
16 something else you can do by being incredibly aggressive  
17 and thorough officers of the court, no matter what side  
18 of the courtroom you sit on.

19 Them getting a last-minute hint that there  
20 might be a lead of a possible incriminating call that  
21 did not take place or could not be found or did not turn  
22 out to exist is why they shouldn't quit until they're  
23 done. The same reason that y'all shouldn't quit until  
24 the last verdict is rendered by the jury. But that  
25 doesn't mean the trial stops every time there's a

1 what-could-happen versus a substantial and firm belief  
2 of what does happen.

3                   And if -- I cannot -- and I'm trying really  
4 conceptually reaching back from the umpire days to the  
5 American League time versus the National League time  
6 that I've sat in the dugouts like you guys do now of  
7 what could be Brady. If there are the words out of your  
8 client's mouth, with thorough interviewing skills, as I  
9 know you have, if your client has indicated something to  
10 you that he told someone and somehow that's Brady, or  
11 something they told him, I would expect you'd be issuing  
12 the subpoenas. In fact, I'm confident that you would  
13 have, regardless of the potential risk of digging up  
14 something that you really don't want to hear or  
15 potential of opening up, under optional completeness,  
16 meaning unrelated conversations that might be unhelpful  
17 to your trial strategy.

18                   But if -- it is my opinion that if this  
19 evidence cannot be used, if it is banned by judicial  
20 decree and order of the Court that it cannot be used, it  
21 cannot be referred to or alluded to, that any phone  
22 conversations of anyone with your client in the Tarrant  
23 County Jail during the time period -- you know, for  
24 limine purposes of -- starting in September of 2012 and  
25 certainly during the time period on this tape that no

1 one will go into, refer or allude to the fact that there  
2 had been any conversations with the Defendant, unless  
3 and until there's a hearing outside the presence of the  
4 jury as to why they would be relevant, that this  
5 disclosure, it's like it didn't happen. And then that  
6 solves the constitutional issue of you can't be sucker  
7 punched with something. And just because there's the  
8 potential, remote in my mind, as it could, that there's  
9 potentially, possibly Brady, that would be true for  
10 every phone call that's been made for two years of  
11 something that's potentially, possibly Brady. And that  
12 could have been explored before now, including the calls  
13 in question.

14 And then there's the dilemma of if there  
15 were some absolute right to know every call at  
16 infinitum, including those during the course of the  
17 trial with something possibly incriminating or possibly  
18 Brady could be said, any calls from this point forward  
19 in the hypothetical, think-outside-the-box position  
20 where a defendant might get on the stand, having sat  
21 through a hearing like this, having continued to call  
22 people and say things on the phone when their lawyers  
23 told them not to do, that conceptually could be  
24 available for impeachment in the hypothetical world.  
25 But anything that's recorded on the face of the exhibit,

1 however it will be marked, will be banned from use by  
2 either side for any purpose, unless there was a hearing  
3 and an extremely compelling reason why it should be  
4 admissible.

5                   And about the only reason I can think of  
6 that that would happen is in the extremely remote  
7 position that there was something that turned out  
8 beneficial to the Defense that was discovered in  
9 hindsight. But I just don't see on the four corners of  
10 a hearsay conversation, I just don't see any way it  
11 becomes admissible except for impeachment of the people  
12 on the call who were accepting your client's calls, or  
13 of your client, if he were to take the stand in either  
14 phase of a criminal trial, if there were a lesser  
15 offense. And it's being banned for all purposes. There  
16 will be a protective order issued. It can't be used.  
17 And, quite frankly, my position would almost be, but for  
18 the fact of future litigation, to say the tape hasn't  
19 been listened to, then by God the original is given to  
20 the court reporter and it doesn't get listened to, or at  
21 least during the course of the trial it's not. And  
22 after the trial, it's available for anyone to go back  
23 over.

24                   But if it's like it didn't happen, then it  
25 didn't happen. And the State surrenders that evidence.

1 So whatever remote fear you might have calling witnesses  
2 in a punishment phase that subconsciously the State  
3 mixes which inconsistent statements might have been made  
4 on a phone conversation versus an interview, they don't  
5 have it and they can't use it.

6 And so I think the Court would be inclined  
7 to deny the motion for continuance as a matter of law,  
8 but order the State to surrender the evidence and it can  
9 be returned to them at the conclusion of the trial or on  
10 the record when they point out a compelling  
11 constitutional reason why they should get it back. If  
12 it never happened, then they don't need it. And then we  
13 just mark the original and surrender it to the court  
14 reporter and two confident and ethical lawyers look me  
15 in the eye and say that's the only copy, Judge, we don't  
16 have another. And you have it.

17 You can have the last word if there's  
18 anything on behalf of your client you want to add, other  
19 than you think I'm wrong, and that I understand from  
20 your expressions and would expect nothing less.

21 MR. MOORE: You sound like my wife.

22 THE COURT: Well, I've known you almost as  
23 long as she has.

24 MR. ROUSSEAU: Your Honor, do you want to --

25 THE COURT: Not quite.

1 MR. MOORE: My expression.

2 MR. ROUSSEAU: I can be back up here in five  
3 minutes with the only disc I have.

4 THE COURT: That will be fine. And have it  
5 marked appropriately. Go get it and surrender it to  
6 court reporter and we'll be done.

7 MR. ROUSSEAU: Thank you.

8 THE COURT: And we're still game-on tomorrow  
9 morning, regular schedule. Get your questionnaires and  
10 everything else. Off the record.

11 (Hearing Concluded at 1:15 p.m.)

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COURT REPORTER'S CERTIFICATE

## 2 | THE STATE OF TEXAS )

3 COUNTY OF TARRANT )

4 I, Karen B. Martinez, Official Court Reporter in and  
5 for the 372nd District Court of Tarrant County, State of  
6 Texas, do hereby certify that the above and foregoing  
7 contains a true and correct transcription of all  
8 portions of evidence and other proceedings requested in  
9 writing by counsel for the parties to be included in  
10 this volume of the Reporter's Record, in the  
11 above-styled and numbered cause, all of which occurred  
12 in open court or in chambers and were reported by me.

13 I further certify that this Reporter's Record of the  
14 proceedings truly and correctly reflects the exhibits,  
15 if any, admitted by the respective parties.

16 I further certify that the total cost for the  
17 preparation of this Reporter's Record is **located at the**  
18 **end of Volume 21.**

19        WITNESS MY OFFICIAL HAND this the 30th day of March,  
20      2015.

/s/ Karen B. Martinez

Karen B. Martinez, Texas CSR 6735  
Expiration Date: 12/31/2015  
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